Filed 6/27/19 Pelaez v. Instaff, Inc. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CESAR PELAEZ etc.,	
Plaintiff and Respondent,	G056341
v.	(Super. Ct. No. 30-2017-00945964)
INSTAFF, INC., et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from an order of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Harker, Campbell & Belfield, James G. Harker and Carol L. Belfield for Defendants and Appellants.

Mahoney Law Group, Kevin Mahoney and Dionisios Aliazis for Plaintiff and Respondent.

* * *

Defendants appeal the trial court's order denying their petition to compel arbitration of plaintiff's statutory wage and hour claims in a putative class action. Defendants contend the statutory claims are subject to arbitration under the collective bargaining agreement (the CBA) covering defendants' employment of plaintiff and all putative class members. The trial court disagreed, finding the CBA contains no "clear and unmistakable waiver" of the right to pursue statutory claims in a judicial forum. We affirm.

I

BACKGROUND

Cesar Pelaez, a journeyman carpenter and member of the United Brotherhood of Carpenters and Joiners of America (Union), filed a class action complaint on behalf of himself and similarly situated workers against his employers, Cruz Modular, Inc. (Cruz) and Instaff, Inc. (Instaff). Cruz is in the business of installing modular furniture for customers at the customers' job sites, and Instaff is Cruz's agent for provision of skilled labor to fulfill installation contracts. The CBA signed by Cruz and the Union set the terms of Pelaez's and the putative class members' employment with Cruz and Instaff, (collectively, the Employers).

The first seven causes of action in the complaint alleged the Employers violated certain provisions of California Industrial Welfare Commission Wage Order 16-2001 (Wage Order 16) and corresponding sections of the California Labor Code regulating overtime, meal and rest periods, wage statements, reimbursement of necessary business expenses, and related topics. The eighth cause of action sought civil penalties under the Labor Code Private Attorneys General Act of 2004 (Lab. Code § 2698 et seq.), based on the statutory violations alleged in the first seven causes of action.

The Employers filed a petition to compel arbitration of the first seven causes of action, contending the CBA contained "a clear and unmistakable agreement to arbitrate all claims arising under the CBA, including all claims arising under [] Wage

Order 16." Pelaez opposed the Employers' motion, arguing the CBA lacked the "clear and unmistakable" waiver of the right to a judicial forum for resolution of Labor Code claims. The trial court agreed with Pelaez's interpretation of the CBA and issued a minute order denying the petition to compel arbitration. The Employers filed this timely appeal.

II

DISCUSSION

A. *Governing Law and Standard of Review*

"A petition to compel arbitration should be granted if the court determines that an agreement to arbitrate the controversy exists. (Code Civ. Proc., § 1281.2.) Fundamental to this inquiry is whether the parties have agreed to arbitrate their dispute. [Citations.] [¶] A union representative may agree on an employee's behalf as part of the collective bargaining process to require the employee to arbitrate controversies relating to an interpretation or enforcement of a CBA. [Citations.] In fact, when a CBA includes an arbitration provision, contractual matters under a CBA are presumed arbitrable; that is, arbitration must be granted as long as the CBA is reasonably susceptible to an interpretation in favor of arbitration. (*Wright* [*v. Universal Maritime Service Corp*. (1998)] 525 U.S. 70, 78-79 [(*Wright*)].)" (*Cortez v. Doty Bros. Equipment Co.* (2017) 15 Cal.App.5th 1, 11-12 (*Cortez*).)

There is an important caveat, however, to the presumption described above: "[T]he presumption of arbitration in a CBA does not apply to statutory violations. (*Wright, supra,* 525 U.S. at pp. 78-79 [cases involving statutory claims 'ultimately concern[] not the application or interpretation of any CBA, but the meaning of a . . . statute' and rights 'distinct from any right conferred by' the CBA]; see [*14 Penn Plaza LLC v. Pyett* (2009)] 556 U.S. [247,] 258 [(*Penn Plaza*)].) Thus, although a union representative in negotiating a CBA in good faith may waive the employee's right to pursue in a judicial forum an action for a statutorily protected right [citation], the United

States Supreme Court has made clear that waiver of the right to prosecute a statutory violation in a judicial forum is only effective if it is explicit, '"clear and unmistakable"' ([*Penn Plaza*, *supra*, 556 U.S.] at p. 254; accord, *Wright*, at p. 80 [the right to prosecute statutory violations in a judicial forum 'is of sufficient importance to be protected against [a] less-than-explicit union waiver' in a CBA]; *Mendez* [*v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534,] 543)." (*Cortez*, *supra*, 15 Cal.App.5th at p. 12, fn. omitted.)

"We apply de novo review to the trial court's interpretation of an arbitration agreement that does not involve conflicting extrinsic evidence. [Citations.]" (*Cortez*, *supra*, 15 Cal.App.5th at p. 12.)

B. *The Trial Court Properly Found Pelaez's Statutory Claims Not Subject to Arbitration*

The Employers contend the trial court erred in denying their petition to compel arbitration. They argue the CBA contains a "clear and unmistakable" agreement to resolve the alleged Wage Order 16 violations through a grievance procedure, rather than in a judicial forum. Complicating the Employers' task of proving that requisite "clear and unmistakable" agreement, however, is the fact the CBA consists of two separate documents which conflict on the arbitrability of Wage Order 16 claims.

As we explain below, the trial court properly concluded these separate but interrelated documents, read together, exclude Wage Order 16 claims from the reach of the CBA's general arbitration provision. Consequently, the appeal lacks merit.

1. The Relevant Provisions of the CBA

The CBA consists of two interrelated labor agreements. The first of these, the "Master Agreement," is a 150-page document covering all manner of construction projects and carpentry specialties that details every aspect of the wages, hours and working conditions for employees, as well as compliance with applicable laws, rules, and regulations, specifically including Wage Order 16. It is the Master Agreement which contains an explicit agreement to arbitrate Wage Order 16 claims. Three "Articles" in the

Master Agreement, Articles IV, VI, and IX, are relevant to finding that explicit agreement to arbitrate.

Article IV of the Master Agreement states that the Contractor and Union intend that "all grievances or disputes arising between them over the interpretation or application of the terms of this [Master] Agreement shall be settled by the procedures set forth in Article VI . . . ." (Art. IV, § 401.)

Article VI is entitled "Grievance and Arbitration" and sets forth in general terms an agreement to arbitrate "all disputes concerning the interpretation or application of the [Master] Agreement . . . ."[1] (Art. VI, § 601.4.)

Article IX is the critical part of the Master Agreement for finding an explicit agreement to arbitrate Wage Order 16 claims. Entitled "Holidays, Payment of Wages, Meal Periods," Article IX contains section 904, which provides as follows: "The parties recognize the applicability of Industrial Welfare Commission Wage Order 16 to work performed under this Agreement. *Any alleged violation of Wage Order 16 shall constitute a grievance which shall be recognized under the grievance procedure of this Agreement. The grievance procedure detailed in Article VI shall be the exclusive method for resolving all alleged violations of Wage Order 16 and the time limitations of the grievance procedure shall apply to the extent permitted by applicable local, state or federal law.* Nothing in this Agreement shall be construed to limit the relief that an arbitrator deems appropriate." (Master Agreement, Art. IX, § 904, italics added.)

A document entitled the "Memorandum Agreement" is the other labor agreement which, together with the Master Agreement, comprises the CBA. The Memorandum Agreement is a 12-page document specific to the modular furniture

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[1] Among the few details in Article VI is the fact that "[t]here is previously established an Independent Contractors Grievance and Arbitration Trust" (Art. VI, § 601) set up to "establish and administer procedures to process grievances and to provide third party independent arbitration on disputes concerning the interpretation or application of this Agreement . . . ." (Art. VI, § 601.1.)

installation industry. It is this industry-specific agreement which conflicts with the Master Agreement concerning the arbitrability of Wage Order 16 claims, leaving the CBA without the "clear and unmistakable" waiver of a judicial forum for resolving these claims.

Three parts of the Memorandum Agreement are relevant to determining whether Wage Order 16 claims are arbitrable under the CBA. The first of these is Paragraph 3b which states: "Except as specifically excluded, modified or superseded by this Memorandum Agreement, such Master Labor Agreements and Trust Agreements are specifically incorporated by reference and made a part of this Memorandum Agreement." (Memorandum Agreement, ¶ 3b.)

Paragraph 4 of the Memorandum Agreement then employs the Paragraph 3(b) power to "exclude[], modif[y] or supersede[]" the Master Agreement by explicitly excluding "all provisions" in the Master Agreement relating to the grievance procedures in Article VI. Paragraph 4, entitled "Exclusions," states: "The parties agree that *all provisions in the Master Labor Agreement covering or relating to* the subjects of strikes, lockouts, jurisdictional disputes and *the Procedure for the Settlement of Grievances and Disputes* (*Articles IV and VI of the Master Labor Agreement*), and the provisions of Paragraph 114 and 115, shall be excluded from this Memorandum Agreement and shall not be binding upon the Contractor or the Carpenters' Unions." (Memorandum Agreement, ¶ 4, italics added.)

After Paragraph 4 of the Memorandum Agreement deletes the Master Agreement's Article VI grievance procedure from the CBA, Paragraph 9 of the Memorandum Agreement creates a new grievance procedure much like the deleted Article VI version. Paragraph 9, entitled "Grievance and Arbitration," using language similar to that used in Article VI, states the Contractor and Union "agree to submit all disputes concerning the interpretation or application of this Agreement and/or the Master

Labor Agreement to arbitration under this Section . . . ." (Memorandum Agreement, ¶ 9 d.)[2]

Importantly, the Memorandum Agreement's Paragraph 9 grievance procedure, like the Master Agreement's Article VI grievance procedure, is a *general* agreement to arbitrate disputes arising under the CBA; neither grievance procedure includes an explicit agreement to arbitrate Wage Order 16 claims. Case law is clear that courts may not compel arbitration unless there is an explicit waiver of a judicial forum for statutory claims, arbitration cannot be compelled. (*Cortez*, *supra*, 15 Cal.App.5th at p. 12 ["waiver of the right to prosecute a statutory violation in a judicial forum is only effective if it is explicit, '"clear and unmistakable"'"].) The Master Agreement fills that gap by including in Article IX, section 904 the requisite "clear and unmistakable" agreement to arbitrate the statutory wage claims ("The grievance procedure . . . in Article VI shall be the exclusive method for resolving all alleged violations of Wage Order 16"). The Memorandum Agreement contains no similar requirement. More to the point, the Memorandum Agreement in Paragraph 4 specifically *excludes* from the CBA the Article IX, section 904, provision requiring nonjudicial resolution of all Wage Order 16 claims.

Of course, Paragraph 4 does not expressly identify Article IX, section 904 as among the excluded Master Agreement provisions, but section 904's implicit exclusion necessarily follows from its mandate that all Wage Order 16 claims be resolved through "[t]he grievance procedure detailed in Article VI" – a mandate indelibly marking

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[2] Adding a few details, Paragraph 9 states, "There has been established under this Agreement, an Independent Contractors-Carpenters Grievance and Arbitration Trust," an entity with a different name than that given to a similar trust described in Article VI of the Master Agreement (see fn. 1, *supra*). The "purposes" of both trusts, however, are stated in identical terms: "to establish and administer procedures to process grievances and to provide third party independent arbitration on disputes concerning the interpretation or application of this Agreement . . . ." (Memorandum Agreement, ¶ 9 a; Master Agreement, Art. VI, § 601.1.)

Article IX, section 904 as a provision "*relating* to" the Article VI grievance procedure and, therefor, specifically excluded from the CBA by Paragraph 4.

The end result is that the CBA contains no explicit, clear and unmistakable agreement to arbitrate Wage Order 16 claims. Consequently, these statutory claims are not subject to mandatory arbitration. (*Cortez*, *supra*, 15 Cal.App.5th at p. 12.)

2. The Employers' Arguments for a Contrary Interpretation of the CBA Lack Merit

The Employers argue the trial court misinterpreted the CBA as lacking an explicit, clear agreement to arbitrate the Wage Order 16 claims. They contend the Master Agreement's Article IX, section 904 provision requiring arbitration of these statutory wage claims "was in fact incorporated into the Memorandum Agreement." Consequently, they argue, the court erred in denying their petition to compel arbitration. The argument lacks merit.

There are two steps to the Employers' argument the trial court erred in concluding the Memorandum Agreement's Paragraph 4 excluded the Master Agreement's Article IX, section 904 Wage Order 16 arbitration provision. The first step concerns the interplay between Paragraphs 3b and 4 of the Memorandum Agreement.

The Employers begin by citing Paragraph 3b's directive that "'[e]xcept as specifically excluded, modified or superseded,'" all provisions of the Master Agreement "'are specifically incorporated by reference and made a part of this Memorandum Agreement[.]'" They next assert that Paragraph 4 does not mention or refer to Article IX or section 904 "in any way." Consequently, the Employers conclude, the "default" rule of incorporation applies because Paragraph 4 did not "specifically exclud[e], modif[y] or supersed[e]" the arbitration agreement in Article IX, section 904; hence, section 904 is incorporated into the CBA, not excluded from it.

Of course, the Employers' assertion that Paragraph 4 does not refer "in any way" to section 904 subtly denies any *implied* reference to section 904 arising from Paragraph 4's mandate that all provisions in the Master Agreement "*relating to*" the

grievance procedure in Article VI "shall be excluded from this Memorandum Agreement and shall not be binding upon the Contractor or the [Union]." The second step of their argument attacks the issue of the implied reference head on, interpreting the phrase "relating to" as meaning something other than what it obviously means.

For example, the Employers argue "relating to" is a "nonspecific phrase" that is too "general" to satisfy the Paragraph 3b requirement that an exclusion must be *specific*. Mixing apples and oranges, they cite the statutory admonition that "'[s]pecific language in a contract controls over general language[,]" and then argue "the contractual mandate that any exclusion be 'specific' must take[] precedence over the general phrase 'covering or relating to.'" The problem with this argument, of course, is that the Paragraph 4 exclusion in issue is anything but "nonspecific." Paragraph 4 specifically excludes "all" provisions in the Master Agreement "relating to" the grievance procedure in Article VI. (Memorandum Agreement, ¶ 4.)

In another attempt to denude the "relating to" language of its obvious meaning, the Employers assert, "While the phrase 'relating to' can be considered in the abstract to be inclusive and broad-based [citation], courts will not give unlimited effect to such language if doing so would lead to a result clearly not intended by the parties. [Citation.]" In a similar vein, the Employers argue "the court should not apply an 'uncritical literalism' to the 'relating to' language in Paragraph 4 in order to create an implied exclusion which the parties to the CBA did not intend."

The Employers' repeated warnings against broadly construing the "relating to" language so as to reach a result the parties did not "intend" brings into focus a key defect in their argument. Without any evidence, the Employers assert the parties intended that the Memorandum Agreement would retain every arbitration provision in the Master Agreement, including the Article IX, section 904 agreement to submit statutory wage claims to the Article VI grievance procedure. The argument is based on a faulty reading of the relevant provisions of the Memorandum Agreement.

Essentially, the Employers assert that although Paragraph 3 explicitly excludes "Article VI itself," it does not exclude the "'procedures detailed in Article VI[.]'" The Employers contend "[t]hose procedures are reproduced in Paragraph 9," the part of the Memorandum Agreement that states the parties' agreement "to submit all disputes concerning the interpretation or application of this Agreement and/or the Master Labor Agreement to arbitration under this Section[.]" (Memorandum Agreement, ¶ 9 d.)

In a crucial mischaracterization of the Memorandum Agreement's arbitration provisions, the Employers contend the arbitration agreements in both documents are virtually identical, asserting "the grievance and arbitration procedures in Paragaph 9 [of the Memorandum Agreement] were carried forward almost word for word from the Article VI [of the Master Agreement]." The Employers even provide a chart in their opening brief laying out certain paragraphs of the two agreements side by side to demonstrate the similarities between the two versions. They contend this purported replication of the Master Agreement's arbitration provisions in Paragraph 9 of the Memorandum Agreement proves the parties intended a complete incorporation of the Master Agreement's arbitration provisions, including the Article 9, section 904 arbitration provision covering Wage Order 16 claims.[3]

The trial court recognized the fallacy in this argument. The court noted that the arbitration agreements in both documents are not the same. The court compared the arbitration provisions in each agreement, observing that in the Master Agreement the Union "agreed to the arbitration of statutory claims provided that the arbitration took place pursuant to the provisions and procedures set forth in Article VI. (While the parties

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[3] The Employers argue Paragraph 4's explicit exclusion of the Article VI grievance procedure was merely a means for moving that arbitration provision's *location* from the Master Agreement to Paragraph 9 of the Memorandum Agreement. They argue, "Only the location of the procedures was modified, but not the scope of what was to be arbitrated."

do not explain those procedures, we at least know that they include creation of a panel of acceptable arbitrators and time limits for the processing of grievances.)" In contrast, "[T]he grievance and arbitration provision in the Memorandum Agreement is not what the parties bargained for in Article IX of the Master Agreement. Beyond the fact that there is no statement in Article IX that allows for arbitration pursuant to the provisions of another CBA [i.e., another interrelated agreement like the Memorandum Agreement], [Paragraph] 9 allows the parties to establish their own grievance and arbitration procedures, including, presumably, a methodology for selecting arbitrators and time limits for the processing of grievances. In all likelihood there are various other procedures, including, for example, a number of steps that must be taken before a case is actually brought to arbitration."

The trial court concluded as follows: "The bottom line is this — if the parties to the CBA[] wanted to ensure that claims brought pursuant to Wage Order 16 were subject to arbitration under the Memorandum Agreement, then they easily could have said so. Instead, they chose to eliminate the requirement that such disputes be arbitrated pursuant to Article VI while at the same time not explicitly stating that Wage Order 16 claims would be arbitrated pursuant to Section 9. In light of this uncertainty and given the pronouncements of the Supreme Court and various other courts that any such waiver be 'clear and unmistakable,' Defendants' petition must be denied."

We agree. The trial court properly denied the petition to compel arbitration.

III

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Pelaez is entitled to his costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.